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In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bell v. *Wolfish*, 441 U.S. 520 4

Camara v. *Municipal Court*, 387 U.S. 523 10

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 10

Donovan v. *Union Packing Co.*, 714 F.2d 838 ..... 4, 6, 7, 8

Knetsch v. *United States*, 364 U.S. 361 4

Marshall v. *Barlow's, Inc.*, 436 U.S. 307 ..... 4, 5, 6, 7, 8, 10

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 ..... 3, 5, 6

Schneckloth v. *Bustamonte*, 412 U.S. 218 ..... 10, 12

United States v. *Mississippi Power & Light Co.*, 638 F.2d 899, cert. denied, 454 U.S. 982 ..... 6, 7

United States v. *Morton Salt Co.*, 338 U.S. 632 6

Constitution, statutes and regulations:

U.S. Const. Amend. IV 5, 7

Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.* :

§ 9, 29 U.S.C. 209 11

§ 11, 29 U.S.C. 211 ..... 8, 10, 11, 12

Page

Constitution, statutes and regulations—Continued:

28 U.S.C. 1252 4

41 C.F.R. 60-1.43 6

Exec. Order. No. 11,246, 30 Fed. Reg. 12319 (1965) 6

Miscellaneous:

Wage-Hour Division, Employment Standards Administration, U.S. Dept. of Labor, *Field Operations Handbook*:

1971 10

1975 ..... 10, 12

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1. The facts in this case have been stipulated, but in light of certain mischaracterizations of those facts made by appellee, it seems appropriate to recount them briefly. Appellee asserts (Br. 6, 8, 12) that government inspectors made "repeated attempts" to enter its premises to conduct an inspection after permission to enter was "repeatedly denied." See also Brief for the National Restaurant Association (NRA) as Amicus Curiae 18 n.6. This assertion is patently false, as is made clear by the stipulated facts (J.A. 11-17) and, indeed, by appellee's own account of the facts (Br. 2-4). This case does not involve *any* attempt to enter private property without consent for the purpose of making a regulatory inspection.

Beginning on January 6, 1982, a Department of Labor compliance officer twice attempted — once by phone and once by letter — to schedule an inspection of appellee's

business (J.A. 12-13). Before the rescheduled inspection occurred,[1] appellee's counsel wrote to the government on January 12, 1982, stating that permission to conduct the investigation would be withheld until the government explained either the reason for the investigation or its scope (J.A. 13). On January 20, 1982, the government responded with a letter from Loren Gilbert outlining the general scope of an FLSA investigation but declining to give the reason for the selection of appellee for inspection. The letter stated that the inspection would be rescheduled for February 2, 1982, and inquired whether appellee still intended to prohibit the inspection, in which case the Department of Labor would request an administrative subpoena. J.A. 14. On January 28, 1982, appellee's counsel telephoned Gilbert to state that permission to conduct the inspection would be denied and that the government would have to obtain a warrant from a magistrate (J.A. 14). This was the first time that appellee stated that it would refuse to consent to the inspection under any circumstances. On February 2, 1982, the compliance officer appeared as scheduled at appellee's premises. This was his first and only visit. After waiting fruitlessly in the lobby area for 20-30 minutes for appellee's manager to appear, the compliance officer served another of appellee's employees with a subpoena duces tecum and departed. J.A. 15. Thus, the "repeated attempts" to enter the premises consisted of one scheduled visit to appellee's lobby to serve a subpoena.

Appellee and amicus NRA also pointedly note that the subpoena was not served until after appellee commenced its suit for an injunction, thus suggesting that the government

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[1] Appellee's manager called late in the day on January 6 to report that the first scheduled date was not convenient. The compliance officer then wrote appellee a letter rescheduling the inspection and stating that appellee should contact him to work out some other arrangement if that date also proved to be inconvenient. J.A. 12-13.

resorted to a subpoena only when faced with litigation over its right to conduct an inspection. See Appellee Br. 12; NRA Br. 12, 19. This suggestion is preposterous. The January 20 letter from the government to appellee clearly stated that the inspection would be rescheduled for February 2, and that an administrative subpoena would be requested if appellee declined to consent to the inspection (J.A. 14).[2] On January 28, appellee informed the government that it would not consent to the inspection (J.A. 14), and the subpoena was issued on that date (J.A. 16). Armed with the knowledge that it could expect to be served with a subpoena on February 2, appellee filed its complaint for injunctive relief on February 1, 1982. This scenario hardly suggests that the government resorted to a subpoena as an afterthought once its inspection authority had been challenged in court.

2. As explained in our op ning brief (Br. 10-14), this Court already has upheld the consititutionality of the subpoena provisions of the Fair Labor Standards Act (FLSA) in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), and that case and its progeny clearly compel rejection of appellee's contention that a warrant is required for the inspection of specified documents.[3] Appellee does

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[2]NRA states (Br. 19 n.7) that this letter's reference to a potential subpoena request was "quite vague." This assertion does not give much credit to the deductive powers of the recipient, but, in any event, another government communication to appellee left no doubt whatsoever about the matter. On January 21, 1982, Associate Regional Solicitor Henry C. Mahlman wrote a letter to appellee's counsel in which he stated, inter alia: "Should your client elect not to permit the investigation, I understand you have been informed we would seek an administrative subpoena duces tecum." No. A1-82-24 Appellants' Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, Exh. D, Attachment 3.

[3]Even one of the amici curiae supporting appellee concedes that the administrative subpoena duces tecum is a valid investigative device. Brief of the Washington Legal Foundation as Amicus Curiae, 13-14. Indeed, none of three amici supporting appellee actually supports its

not see fit to discuss these cases; its only comment is that they "were decided decades ago" (Br. 8). This has not heretofore been recognized as a reason for failing to follow binding precedent. In our opening brief (Br. 15-17), we also explained why there is no merit to appellee's contention (Br. 10-11, 12-13) that *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), requires an agency to obtain a warrant, not a subpoena, whenever it desires to inspect documents. Subsequent to the filing of our opening brief, the Eighth Circuit rendered a decision unequivocally rejecting, in the context of an OSHA subpoena, the contention that *Barlow's* prohibits an agency from obtaining any documents by subpoena without a warrant. *Donovan* v. *Union Packing Co.*, 714 F.2d 838 (1983). Thus, were it not for the direct appeal provision of 28 U.S.C. 1252, it is clear that the district court's decision would be subject to summary reversal by the Eighth Circuit.

3. Amicus Equal Employment Advisory Council (EEAC) raises a contention not made in the court below. It asserts (Br. 9-25) that a subpoena duces tecum is invalid unless the government demonstrates the reasonableness of its selection of the recipient of the subpoena. EEAC therefore urges this Court to remand this case to the district court to inquire into the reason why appellee was chosen for investigation.

Even if this argument were raised by appellee, rather than by an amicus curiae,[4] it would be inappropriate for the Court to consider the contention because it goes beyond the scope of the issues presented in the complaint. Appellee's complaint asserts that the Constitution requires a warrant

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position that the subpoena duces tecum is no longer a valid administrative investigative device and that the Secretary of Labor should be required to obtain a warrant in order to examine relevant documents.

[4]See *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).

to inspect documents and bars resort to an administrative subpoena duces tecum. If upheld, this contention would require the district court to quash or refuse to enforce the subpoena, which is in fact what the court did. If EEAC's contention were upheld, however, there would be no need to quash the subpoena; rather, the remedy would be to require the government to explain in the subpoena enforcement action the reason appellee was selected for investigation. Thus, EEAC seeks relief that was not sought in the complaint.

b. In any event, EEAC's contention is wholly without merit. EEAC concedes, for purposes of its argument, that the Fourth Amendment does not require the use of a warrant to examine business records (Br. 9, 21). EEAC argues instead (Br. 21) that, if the Secretary desires to resort to a subpoena, *Barlow's* requires him "to show that his investigatory target was chosen on the basis of specific, neutral criteria." This contention basically seeks to engraft the administrative probable cause requirement that attaches to a request for a search warrant onto the subpoena power. Nothing in *Barlow's* requires such a result, which is totally inconsistent with *Oklahoma Press* and its progeny.

In *Barlow's*, the Court simply applied the longstanding rule that "warrantless searches are generally unreasonable" (436 U.S. at 312), and concluded that there were not sufficient grounds in the context of OSHA inspections to justify an exception to that rule. Given its holding that a warrant was required, the Court went on to consider the substantive standard that had to be met to obtain a warrant, *i.e.*, what was the content in this context of the "probable cause" requirement of the Warrant Clause. It concluded that the "probable cause" requirement could be satisfied by certain showings, including a showing that the inspection was being made pursuant to a general administrative plan based on specific neutral criteria. 436 U.S. at 320-321, 323.

When *Barlow's* was decided, it was also a longstanding rule that an administrative subpoena duces tecum is not an "actual search" and that such a subpoena is not subject to the requirements of the Warrant Clause. Rather, it was well settled that the validity of a subpoena is assessed under a reasonableness standard making certain specific inquiries into, for example, the relevance and burdensomeness of the document request. See generally Appellants Br. 11-14; *United States* v. *Morton Salt Co.*, 338 U.S 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling, supra. Barlow's* did not suggest any modification of this well settled rule. The concept of "specific, neutral criteria" that EEAC seeks to engraft onto the subpoena power (see EEAC Br. 14-15) was specified in *Barlow's* as an element of the "probable cause" needed to obtain a warrant. There is no reason to suppose that the Court in *Barlow's* intended it to apply to a subpoena duces tecum, where there is no warrant and, the Court has unequivocally held, no probable cause requirement. Put another way, *Barlow's* involved a "search"; there is no reason to transfer the probable cause standard required for a search to the subpoena context, where there is no search and where the standards for assessing the validity of a subpoena are already well established.

EEAC relies for support principally on language in two court of appeals decisions, *Donovan* v. *Union Packing Co., supra*, and *United States* v. *Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir.), cert. denied, 454 U S. 892 (1981). EEAC Br. 10, 12, 14-16, 22-25. Neither case provides any support for its position.

Mississippi Power & Light Co. did not involve an administrative subpoena duces tecum, but rather a broad, on-site inspection of documents (see 41 C.F.R. 60-1.43) as part of an investigation to determine compliance with Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965). The government brought suit for injunctive relief to enable it to conduct the

inspection. See 638 F.2d at 902. The court of appeals held that the inspection would satisfy the Fourth Amendment if it were shown, inter alia, that the search was pursuant to " 'an administrative plan containing specific neutral criteria' " (638 F.2d at 907 (quoting *Barlow's*, 436 U.S. at 323)). This decision therefore adds nothing to *Barlow's*, and EEAC's heavy reliance on it is mystifying. It was assumed by the court that the inspection was an administrative "search" and therefore subject to the constraints imposed in *Barlow's*.[5] The court never considered the possibility that the proposed inspection could be analogized to a subpoena duces tecum, rather than a search, and its opinion has no application to subpoenas.

Moreover, *Mississippi Power & Light Co.* is plainly distinguishable on its facts. The inspection at issue there, even though it focused primarily on documents, bears little resemblance to the subpoena duces tecum involved here. As explained in our opening brief (Br. 17 n.9), there is an important difference between an entry onto premises to conduct a broad inspection of documents and a subpoena requiring the production of certain specified documents off premises. A subpoena involves no entry, and it allows the subpoenaed company itself to search through its files to find those documents that are specified by the subpoena as relevant.

The decision in *Union Packing* also is completely inapposite. As noted above, that case flatly rejected the argument that *Barlow's* requires the issuance of a warrant to inspect documents in circumstances not involving an entry onto private premises. In the course of discussing the case, the

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[5]The court of appeals found that a formal warrant was unnecessary because the regulatory requirement that a court order be obtained before conducting a nonconsensual inspection was the "equivalent" of a warrant (638 F.2d at 907; see *Barlow's*, 436 U.S. at 325).

court noted that Union Packing's records were sought "based on the neutral criteria that the company was a member of a high hazard industry" (714 F.2d at 842).[6] This statement in no way suggests, however, that an otherwise lawful subpoena could not be enforced if it were not based on such neutral criteria. To the contrary, the court of appeals concluded its analysis by applying the traditional standards for assessing the validity of a subpoena (*ibid.* (citation omitted)):

> The demand for documents is specific, the records sought are primarily those the company is required to keep and make available under the statute, and the documents are necessary to a calculation of the company's lost workday injury rate.

Indeed, the court noted that if additional hurdles were placed in the way of the subpoena power, as EEAC suggests, the Secretary would be unable to obtain preliminary information without which "it would be difficult for the Secretary to develop a pian with neutral criteria which could be used to select a workplace for inspection" (*id.* at 841).[7]

4. Amicus NRA raises several extraneous issues. First, it contends (Br. 14-17) that the authority conferred upon the Secretary by Section 11 of the FLSA (29 U.S.C. 211) to

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[6]These criteria, of course, were developed by OSHA in light of *Barlow's* to justify the "actual searches" that OSHA inspections entail.

[7]EEAC also asserts (Br. 24) that it is impossible to assess whether the subpoena is "properly limited in scope" without knowing the reason appellee was selected for inspection. This assertion is quite mistaken. The reasonableness of the subpoena turns on the connection between the documents sought and the purpose of the investigation. Here, as we noted in our opening brief (Br. 14), the subpoenaed documents were plainly relevant to the purpose of the inquiry — determining whether appellee was complying with FLSA requirements. The reason for selecting appellee for inspection is totally irrelevant to this inquiry.

enter premises for the purposes of conducting an inspection in unconstitutional. See also Brief of the Washington Legal Foundation as Amicus Curiae. As explained in our opening brief (Br. 19 n.11), the issue of the facial validity of Section 11 is not presented here because the government did not attempt a nonconsensual entry of appellee's premises; this litigation has focused on the government's insistence that appellee produce specified documents for inspection off premises pursuant to a subpoena duces tecum. The government clearly stated in the district court that "compliance officers are instructed not to enter any non-public area of any establishment without the employer's permission," and it did not endeavor to justify any right to make such nonconsensual entries. No. A1-82-24 Memorandum in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 13; see also Appellants' Motion for Summary Judgment and Memorandum of Law in Support Thereof 14-16.[8] In short, the issue in this case is the constitutionality of a subpoena duces tecum, not an imaginary forced entry.[9]

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[8]In fact, the Secretary of Labor does not have a policy of making nonconsensual entries onto private premises to conduct FLSA investigations, and there is no reason to expect that the Secretary will adopt such a policy in the future.

[9]This is reflected in appellee's filings as well. NRA places great reliance on appellee's prayer for declaratory relief (see Br. 8, 19 n.8, 21 n.9), but that was narrowly focused on the validity of executing a subpoena off premises. The complaint requested "[t]hat a Declaratory Judgment be granted declaring that the Fair Labor Standards Act is unconstitutional insofar as it purports to authorize a warrantless inspection of records *by way of administrative Subpoena after entry to inspect has been denied*" (J.A. 22 (emphasis added)). The prayer for injunctive relief did seek an injunction against "entering [appellee's] premises" or "seizing any of [its] property with an administrative Subpoena" (J.A. 22), but, as noted above, the government's response made clear that it had no wish to enter the premises without permission.

NRA also asserts (Br. 20-22) that the Secretary's standard operating procedure for conducting FLSA investigations "constitutes a deliberate pattern of deprivation of Fourth Amendment rights" (Br. 21 (footnote omitted)). The exact thrust of this accusation is somewhat unclear, but it seems at least partly directed at the Secretary's policy of attempting to make a consensual entry before resorting to a subpoena duces tecum. But this procedure surely is unobjectionable. It is clear that Section 11 of the FLSA authorizes the Secretary to "enter and inspect" an employer's place of business with its consent (*Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 364 (1942)), and such a consent search is, of course, constitutionally permissible (see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973)). This Court has specifically recognized the appropriateness of consensual investigations where an administrative warrant would otherwise be required for entry. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 316 (noting that a warrant requirement probably would not impose serious burdens on the government or the courts because most employers can be expected to consent to inspection without a warrant); *Camara* v. *Municipal Court*, 387 U.S. 523, 539 (1967) ("most citizens allow inspections of their property without a warrant" and therefore "warrants should normally be sought only after entry is refused").

The Secretary of Labor likewise has recognized that it is advisable first to seek an employer's consent to a Wage-Hour investigation. Such a consensual inspection is often more convenient for both the government and the employer. The Department's practice in this regard is reflected in the excerpts of the Wage-Hour *Field Operations Handbook* cited by NRA (Br. 6, 21-22). The procedure set forth in the Handbook in effect at the time of this investigation[10]

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[10]In October 1982, certain revisions were made to Chapter 86b of the Handbook, but they have no bearing on the discussion here.

instructed Wage-Hour officials first to ask an employer's permission to conduct an investigation before resorting to a subpoena. It is clear, however, that "compliance officers are not permitted to enter any non-public area of any establishment without the employer's consent." Affidavit of Loren Gilbert, Assistant Regional Administrator for Wage-Hour, No. A1-82-24 Appellants' Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, Exh. C. If permission to enter is refused, a subpoena seeking the relevant documents may be issued by the Wage-Hour Administrator. Wage-Hour Division, Employment Standards Administration, U.S. Dept. of Labor, *Field Operations Handbook*, ch. 52, § 52a05 (1971); *id.* at ch. 86, §§ 86b00, 86b01 (1975).

NRA principally objects to the Secretary's policy of contacting employers who decline to consent to an inspection and apprising them of the Secretary's investigative powers and responsibilities set forth in Sections 9 and 11 of the FLSA (29 U.S.C. 209 and 211) before requesting a subpoena (Br. 20-22). NRA characterizes this policy as one designed to obtain "coerced consents" that ought not to be considered valid (Br. 22-24). Of course, there is no issue here of coerced or invalid consent because no consent was given in this case, but it is nevertheless appropriate to respond more broadly that there is nothing improper in the Secretary's standard operating procedure. NRA places a sinister cast upon the procedure by misleadingly stating that the compliance officer is instructed "to specifically direct the employer's attention to the warrantless entry and inspection provision of FLSA Section 11(a)" (Br. 21 (footnote omitted)). But there is no singling out of the few words of the statute that authorize inspection entries; the policy is to apprise the employer of *all* of the provisions of Section 11 and Section 9. It is difficult to see what is inappropriate

about showing the employer the text of the relevant statute. It has the salutary effect of, inter alia, assuring the employer that the government is indeed authorized to investigate wages and hours, informing it of the scope of that investigative responsibility, and apprising it that the government is empowered to request a subpoena to obtain documents if the employer declines to permit the inspection. This policy has the effect of informing the employer's decision whether to consent to an inspection, not of exerting a coercive influence upon it.

The accusation that there exists a government policy of coercing consents to FLSA inspections is belied, not confirmed, by the facts of this case. Obviously, appellee did not feel any compulsion to consent to an inspection Appellee initially declined to allow the inspection when it was first scheduled and subsequently communicated its intention to refuse consent under any conditions. The government did not attempt to enter by force or threat; it acceded to appellee's refusal. The government action singled out as "coercive" by NRA (Br. 22, 24) is Loren Gilbert's January 20 letter outlining the general scope of an FLSA investigation and referring to the Secretary's authority under Section 11 of the FLSA. That "coercive" letter concluded by *asking* appellee to notify the government whether it would permit the inspection (J.A. 14).[11] In sum, the FLSA investigation of appellee at all times has been conducted in a manner that is beyond reproach.

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[11]Of course, a consent may be valid even without such notification of a right to refuse consent. See *Schneckloth* v. *Bustamonte*, 412 U.S. at 231, 234. Nevertheless, Gilbert inquired whether appellee would voluntarily permit the inspection, and that inquiry reflects standard procedure. See *Field Operations Handbook, supra*, ch. 86, § 86b00(c).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE
Solicitor General

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